

# Nadler Considers Possible Reforms to the Electronic Communications Privacy Act

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WASHINGTON, D.C. - Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, chaired a hearing on the Electronic Communications Privacy Act (ECPA), exploring what type of reforms may be necessary to bring the law up to date with recent advances in technology.

"ECPA was passed in 1986, well before we commonly used the Internet for e-mail, much less for 'cloud computing' and remote storage, when cell phones were rare and included no tracking technologies capable of mapping our every movement," said Nadler. "Communications technology now evolves at an exponential pace. Certain technological advances provide criminals with new platforms for unlawful activity, and, other advances provide new opportunities for law enforcement agencies charged to protect us from such criminals to intervene in our private lives. Thus, we must consider whether ECPA still strikes the right balance between the interests and needs of law enforcement and the privacy interests of the American people."

ECPA, originally enacted in 1986, was intended to reestablish a balance between privacy and law enforcement needs, which Congress found had been upset by the development of communications and computer technology.

The law regulates how the government can obtain access to wire, electronic, and stored communications and customer records.

But, in recent years, new technologies - including cloud computing, social networking, and location-based services - have rendered many of the law's provisions outdated, vague, or inapplicable to emerging innovations. Such legal disarray can put government investigations, private industry and consumers at risk in a variety of ways. Today's hearing addressed possible ways of solving these problems and updating the law.

Witnesses at the hearing were: Jim Dempsey, Vice President for Public Policy, Center of Democracy and Technology; Albert Gidari, Partner, Perkins Coie LLP; Annmarie Levins, Associate General Counsel, Microsoft Corporation; and, Orin Kerr, Professor, George Washington University Law School.

The following is the text of Nadler's opening statement, as prepared:

"Today's hearing is the beginning of a process through which this Subcommittee will revisit the statutory framework Congress established in the 1986 Electronic Communication Privacy Act (ECPA) in light of the enormous technological advances which have taken place in electronic communications over the last twenty-four years.

"Because of the complexity of this subject, both legal and technological, this hearing will probably be the first of several we will hold as we consider what if any reforms should be made to the Act so that it might function more effectively for the future.

"ECPA was passed in 1986, well before we commonly used the Internet for e-mail, much less for 'cloud computing' and remote storage, when cell phones were rare, often the size of small kitchen appliances, and included no tracking technologies capable of mapping our every movement.

"Communications technology now evolves at an exponential pace. So, in 1986, ECPA fixed the statutory

standards law enforcement would have to meet to access private communications data in a technological environment as far removed from our own as that of 1986 was from the day Alexander Graham Bell said 'Mr. Watson. Come here. I need you' in the first telephone call 110 years earlier.

"The lightening pace of innovation in communications technology brings with it enormous improvements in the quality of life for our citizens that, in many ways, mark the age we live in as a new epoch - the 'Internet Age.'

"But it must be said, particularly by the Committee on the Judiciary, that these advances also provide criminals with new platforms for unlawful activity. Moreover, it must also be said here on the Subcommittee on the Constitution that these robust new communications technologies bring with them new opportunities for law enforcement agencies charged to protect us from such criminals to intervene in our private lives. Thus, we must consider whether ECPA still strikes the right balance between the interests and needs of law enforcement and the privacy interests of the American people.

"This is only the beginning of a dialogue that must go on to include the input of, among others, law enforcement at the federal, state and local level, private industry stakeholders across the complex network of networks that is modern communications, and academic experts on technology, privacy and Fourth Amendment issues.

"But today, all of the members of this Subcommittee can begin this inquiry through a dialogue that raises these issues with this distinguished panel of witnesses. Today, we can begin the work of making ECPA work for our time and for all concerned.

"That is an enormous responsibility and this Subcommittee needs your help to get this right. As such, all of us sit on this panel, at least in part, as students today. I thank you in advance for what you will teach us.

"As for myself, some of the questions I propose to the class are:

"How have changes in the Internet made it difficult for private industry to determine its obligations under Title II of ECPA, the Stored Communications Act?

"How do current advances in location technology test traditional standards of the ECPA of 1986?

"More generally, in what ways have these and other technologies potentially subverted one of the original and central goals of ECPA, to preserve 'a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement'?

"If we are out of balance, what concepts should guide reform?

"I know my distinguished colleagues will have other questions.

"Finally, I'd like to observe that we are aware that privacy advocates and members of industry have worked

together in an impressive common effort to derive and propose some common principles that should guide our inquiry on ECPA reform. I look forward to hearing them articulated by you here, in person. It is my hope that we on this Subcommittee can emulate your example and come together in a bipartisan spirit as we forge ECPA reform legislation that will put needed reforms in place this year.

"I welcome our witnesses, and I look forward to your testimony."